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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 541

MICHIGAN CONSOLIDATED GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, PANHANDLE EASTERN PIPE LINE COMPANY, UNION GAS COMPANY OF CANADA, LIMITED, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The briefs filed by the Federal Power Commission, Panhandle Eastern Pipe Line Company and Union Gas Company of Canada, Ltd. point up and emphasize the important legal issues presented by the petition for certiorari. In arguing that no important question of statutory interpretation is presented, respondents themselves formulate and highlight that question. While attempting to distinguish the decision below from that of the Court of Appeals for the District of

Columbia in *City of Pittsburgh, et al.* v. *Federal Power Commission,* 237 F. 2d 741, respondents' briefs themselves demonstrate the basic conflict in those decisions.

At the outset, it is important to disabuse the Court of any notion that the issues presented by the petition for certiorari involve any disputed issues of fact. They do not. Petitioner did not challenge the Commission's findings of fact either upon rehearing before the Commission (R. 1373-83) or upon review in the court below. It does not do so now.

Petitioner *does* contest the ultimate conclusion of the Commission that the proposed exportation of gas is consistent with the public interest under Section 3 of the Natural Gas Act, and its concomitant conclusion that the exportation of such gas will not result in an impairment of Panhandle's ability to render adequate service to its domestic customers. These conclusions rest upon an unwarranted application of the statute by the Commission and cannot be reconciled with the *City of Pittsburgh* decision.

So that there may be no question in the Court's mind, it is worthwhile to reiterate two basic facts that cannot be disputed.

First, there is no question on this record that there exists on Panhandle's system a large unsatisfied demand for firm, peak-day deliveries of gas. The Commission and Panhandle admit this to be true (Comm. Br. 7; Pan. Br. 10).[1] Strangely, Union spends a large part of its brief (*e.g.*, pp. 4-5) arguing that there

[1] The brief of the Federal Power Commission will be cited as "(Comm. Br.)"; that of Panhandle as "(Pan. Br.)"; and that of Union as "(Union Br.)." Emphasis is supplied throughout.

actually is no such unsatisfied demand despite the Examiner's specific finding that "the present firm peak-day requirements of Panhandle's customers are at least 187,200 Mcf per day in excess of Panhandle's capacity" (R. 1243). This finding was not questioned, much less set aside, in the Commission's opinion, while the court below expressly acknowledged that Panhandle's customers required additional peak-day volumes of gas (Pet. 15a). There is thus no question that the firm, peak-day requirements of Panhandle's domestic customers remain unsatisfied, and Union's arguments to the contrary are wholly inexplicable.

Second, it is undisputed that, by means of underground storage facilities, off-peak, interruptible gas may be used to supply the firm, peak-day requirements of the distributing companies. The Examiner so found (R. 1242) and Panhandle admits as much by suggesting (Pan. Br. 16) that it is continuing to develop its Waverly Field for storage.[2] Indeed, this is precisely how Union proposes to use the off-peak gas here involved.

Thus, the practical question before the Commission was whether Panhandle should be authorized to ex-

[2] Panhandle now suggests (Pan. Br. 16) that it is still actively developing its Waverly Storage Field in Illinois and that the Howell Field is not actually usable for storage. Both contentions are squarely contrary to the record. With respect to the Waverly Field, Panhandle's counsel stated that "it is not in the picture so far as this pending proceeding is concerned" (R. 418), and to this date Panhandle has not filed an application for development of that field for storage. With respect to the Howell Field, a Panhandle official testified: "This field has a present deliverability of ten million cubic feet per day, which can be made available to the mainline system with the installation of compressor facilities *and the placing of this reservoir on storage operation*" (R. 885).

port off-peak gas to Union for injection into storage on the Canadian side of the Detroit River in order to supply the peak-day demands of new Canadian consumers, or whether Panhandle should inject such off-peak gas into storage on the American side of the river to fill the unsatisfied peak-day demands of its utility customers in the United States. Panhandle's *private* interest, of course, was to sell the gas in Canada at an unregulated price 20% higher than its regulated domestic rate. Whether such a sale, in derogation of the needs of Panhandle's domestic customers, is in the *public* interest is the basic question before the Court.

1. THE ISSUE UNDER SECTION 3 OF THE NATURAL GAS ACT IS CLEARLY DEFINED

With regard to Section 3 of the Natural Gas Act, Union states quite properly in its brief (p. 19):

> "In administering this provision the Commission has elaborated various relevant considerations, the most important of which is the adequacy of the applicant's service to domestic customers."

As noted above, it is undisputed on this record that Panhandle's firm, peak-day service to its domestic customers is inadequate by at least 187,200 Mcf per day (R. 1243). Moreover, Panhandle's application to abandon its service to petitioner is expressly based upon the "unsatisfied demands of its peak-day customers" (Pet. 17a).

Since "adequacy of the applicant's service to domestic customers" is admittedly the prime consideration in an export case, and since Panhandle's peak-day deliveries to such customers are admittedly inadequate, it would seem only logical that the Commission

should concern itself to determine whether the off-peak gas proposed to be exported by Panhandle could be used to supply that deficiency. Petitioner's extensive and *uncontroverted* evidence that this could be done by development of the Howeli Field for storage was at least a *prima facie* showing of the feasibility of that alternative (R. 1242-43).

The Commission, however, proceeded upon the assumption that it had no responsibility or obligation to ascertain or determine the feasibility of developing the Howell Field for storage before finding that the proposed exportation of gas is consistent with the public interest. Significantly, the Commission made no finding that the Howell Field cannot be used for storage but simply said that additional evidence would be needed to make that determination. However, the Commission made no attempt to obtain the additional information it thought necessary, either through its own Staff or from Panhandle.

The court below sustained the Commission's action on two grounds: (1) that it was unnecessary for the Commission to consider this alternative because its authority to order development of the Howell Storage Field is "more than doubtful"; and (2) that the burden of ascertaining the feasibility of such an alternative proposal "is certainly not upon the Commission" (Pet. 16a).

None of the respondents defends the court's first ground of decision. All argue in effect that it was dictum and that the judgment really rests upon the second ground. If dictum, which seems doubtful in the light of the court's decision in the companion case of *Central West Utility Company* v. *Federal Power*

Commission, 247 F. 2d 306, it is unsound dictum which should not be permitted to serve as a basis for argument in future cases in this highly important area.

Respondents do defend the court's second ground of decision. They say that the entire "burden of proof" was on petitioner to prove the feasibility of the Howell Field, and that petitioner failed to sustain that burden (Comm. Br. 9; Pan. Br. 17; Union Br. 14). We contend, on the other hand, that this matter cannot be resolved in terms of "burden of proof" since it is the statutory duty of the Commission, before issuing an export order, to ascertain and determine whether the gas proposed to be exported could be utilized, through storage, to meet unsatisfied requirements in the United States. This issue is sharply drawn; it is not factual but legal, and it is of transcendent importance in the administration of the Act.

We do not propose to argue the question here. We do suggest that the following considerations are presented:

(1). The argument that the "burden of proof" is upon the intervenor assumes that the question whether natural gas should be exported from the United States is nothing more than a dispute between private litigants. But that is not what the statute says or means. Under Section 3, the Commission is charged with determining whether the "public interest" permits such exportation. It is not simply an umpire deciding between private antagonists. Under Section 18 of the Act, the Commission is empowered to employ such attorneys and experts "as may be necessary for carrying out its functions." Its principal function is to determine what will *best* serve the "*public* interest"

and the "*public* convenience and necessity." *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572, 578-581. Respondents do not contend that the Commission discharged that obligation in this case. Instead, they argue that "the Commission's function under Section 3 is *not* to determine which of several schemes is the *most* desirable" and that the Commission properly restricted its inquiry to the four corners of the applicant's export proposal (Union Br. 14; Comm. Br. 9; Pan. Br. 17).

(2) Even on a strict "burden of proof" basis, the burden was not upon petitioner but on Panhandle to satisfy the Commission that its proposal was in the public interest. Under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 1006(c), "the proponent of a rule or order shall have the burden of proof." Here, Panhandle was the proponent of the export order. It had the primary responsibility of satisfying the Commission that its proposal was in the public interest. To shift that burden to an intervenor who opposes the order is unsound and unprecedented.

(3) If the "burden of proof" is imposed upon an intervenor to show that the applicant may feasibly utilize its facilities in a particular manner, serious practical problems arise. The details necessary to sustain such a burden are often possessed by the applicant alone, and by merely standing mute, as in this case, it may defeat a factual determination of the merits of the intervenor's proposal.

2. RESPONDENTS' BRIEFS EMPHASIZE THE CONFLICT WITH THE CITY OF PITTSBURGH CASE

Petitioner showed in the petition for certiorari that the decision below conflicts with the decision of the Court of Appeals for the District of Columbia in the *City of Pittsburgh* case in two important respects. Respondents' efforts to distinguish that case merely emphasize that essential conflict.

(A) The first ground of conflict pointed out in the petition was the conclusion of the court below that the Commission had no obligation to ascertain the feasibility of the Howell Field storage project because its authority to order Panhandle to develop that project was "more than doubtful," as opposed to the conclusion of the court in *City of Pittsburgh* that the fact that "the Commission has no authority to command the alternative does not mean that it cannot reject the proposal" (237 F. 2d at 751). Respondents make two answers. First, they say that the statement of the court below on this point was unnecessary and may be regarded as dictum, as has been pointed out. Second, they say that in the *City of Pittsburgh* case the Commission had excluded evidence of the more desirable alternative, whereas here it had not.

Both answers are untenable. The court below based its decision on this point upon the proposition that the Commission had no duty to consider the proposed alternative (*i.e.*, development of the Howell Field for storage) because it had no *authority* to order such development. This was the very ground upon which the Commission had excluded the proffered evidence in the *City of Pittsburgh* case, and the court there held that the legal premise for the exclusion of evidence was erroneous. Thus, the position of the two courts is irreconcilable.

(B) The second ground of conflict arises from the refusal of the court below to consider the fact that, pending review in the Court of Appeals, Panhandle filed an application to abandon its entire service to petitioner on the ground that the gas is "urgently needed" by its other domestic customers. This is to be contrasted with the holding in *City of Pittsburgh* that the court must consider a material event arising after issuance of the Commission's order and before court review. Respondents attempt to explain the conflict by arguing that, in the *City of Pittsburgh* case, the likelihood of future expansion was a matter of record in the case before the Commission, although the application for such expansion was not filed until the case was before the court upon review, whereas here Panhandle's intention to abandon service to petitioner was not before the Commission when it authorized the exportation of gas to Canada.

Even assuming that respondents' asserted factual distinction were correct, which it is not, the decisions are in irreconcilable conflict. For in the *City of Pittsburgh* case, the Court said with respect to the facts relating to the new application filed pending the appeal:

> "Were those details necessary, we should hold the evidence admissible. In our review of administrative determinations, it would be most unrealistic to disregard crucial events occurring pending appeal." (237 F. 2d at 752, fn. 33)

In support of that conclusion, the court cited its decisions in *Fleming* v. *Federal Communications Commission*, 225 F. 2d 523 and *Enterprise Co.* v. *Federal Communications Commission*, 231 F. 2d 708. In the former case, the death of one of the applicants for a

license pending review of the Commission's order was held to require remand to the Commission for consideration of that circumstance, while in the latter case a shift in the financial arrangements of certain applicants for a license following the Commission's decision was held to require a remand to the Commission for consideration of that circumstance. These decisions are likewise in clear conflict with the decision below, even upon the premise that Panhandle's intention to abandon service to petitioner was not before the Commission when it issued its export order.

The fact is, however, that Panhandle's plan to abandon all or a portion of its service to petitioner was well known to the Commission and was a part of the record upon which the order authorizing exportation of gas was issued.

In the first place, Panhandle's original application for expansion of its facilities, with which its export proposal was consolidated, contemplated a partial abandonment of Panhandle's service to petitioner (R. 1020), and petitioner's petition for leave to intervene in the proceedings was based in part upon this proposed reduction in service (R. 1038). Thereafter, in separate proceedings the Commission denied Panhandle's application for partial abandonment of its service to petitioner, but Panhandle's petition for review of that order was pending in the court below at the time the Commission issued its order authorizing the exportation of gas to Canada.

On July 25, 1956, some five days *before* petitioner applied for rehearing on the export order, the court below affirmed the order denying Panhandle's application partially to abandon service to petitioner but not d

in its opinion that, upon receipt by petitioner of additional gas from another source, "Panhandle will be free to renew its application for partial abandonment of its service to Detroit." (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 236 F. 2d 289, 294.) In its petition for rehearing of the export order, petitioner accordingly referred the Commission to Panhandle's repeated attempts to abandon service to petitioner on the basis of the "unsatisfied demands of its other customers in the United States" (R. 1376). However, the Commission denied rehearing on the export order (R. 1384-88) and two weeks thereafter, as had been anticipated, Panhandle filed an application to abandon *all* of its service to petitioner. To say that Panhandle's intention to abandon part or all of its service to petitioner was not before the Commission in the export case is to ignore the facts.

The significance of Panhandle's abandonment proposal is this: The court below emphasized the fact that petitioner had not sought any of the additional peak-day gas which would be provided by the development of the Howell Field for storage and that none of Panhandle's other customers were objecting to Panhandle's export proposal (Pet. 15a). In its brief (p. 9, fn. 7) Union even suggests "considerable doubt" as to whether petitioner is aggrieved by Panhandle's failure to satisfy the peak-day demands of its other customers. The answer to both propositions is that Panhandle was then and is now proposing to meet the unsatisfied peak-day demands of its other customers with the gas which would be made available by abandonment of its long-standing service to petitioner.

The refusal of the court below to consider Panhandle's abandonment proposal, in view of these cir-

cumstances, is diametrically opposed to the decision of the court in the *City of Pittsburgh* case. The conflict is direct and the question important. It should be resolved by this Court.[3]

CONCLUSION

Important questions of statutory interpretation and a conflict between circuits make this an appropriate case for the exercise of this Court's certiorari jurisdiction.

Respectfully submitted,

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[3] Respondents imply that the right of petitioner to apply to reopen the export case cures the inequity of the situation. It does not. A similar argument was rejected by the court in *City of Pittsburgh*, which held that the matter "must be considered now" (237 F. 2d at 752).